

ORDINANCE NO. 20090806-033

AN ORDINANCE AUTHORIZING AND APPROVING THE CREATION OF PECAN STREET PROJECT, INC., A TEXAS NON-PROFIT CORPORATION; APPROVING THE CERTIFICATE OF FORMATION AND BYLAWS OF PECAN STREET PROJECT, INC.; APPROVING THE PURPOSES AND ACTIVITIES OF PECAN STREET PROJECT, INC.; AND APPROVING THE APPOINTMENT OF CITY REPRESENTATIVES TO SERVE ON THE INITIAL BOARD OF DIRECTORS FOR PECAN STREET PROJECT, INC.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. Findings. The city council finds that:

- (A) On September 25, 2008, the City Council adopted Resolution No. 20080925-084 directing the City Manager to work with the Environmental Defense Fund, the University of Texas, and other community stakeholders, including citizens, environmental advocates, public interest groups, and private sector businesses, to conduct an analysis of system improvements, technology advances, business models, and public investments that would enable Austin Energy to more fully develop its capacity for the distributed generation of clean energy including the potential to develop new products and revenue streams, in furtherance of the goals of the Pecan Street Project.
- (B) Distributed generation and smart grid technologies hold great potential to maximize energy efficiency and the use of renewable energy sources, but the full realization of these technologies will require advances and investments in energy generation, storage, transmission, and communications technologies.
- (C) A robust, reliable distributed generation supply within Austin Energy's distribution grid would make it possible to produce locally significant amounts of solar, wind and other types of emission-free energy, thereby improving local air quality, positively positioning the City in a potential carbon cap-and-trade system and potentially protecting consumers from the impact of transmission congestion costs and fuel-price volatility on their electric bills.
- (D) Distributed generation and smart grid technologies hold immense economic opportunities to create jobs through technology development, engineering, and manufacturing.

- (E) New products, services, and systems could create new revenue for Austin Energy and the City.
- (F) The City desires to authorize and approve the creation of Pecan Street Project, Inc., a Texas nonprofit corporation, to promote social welfare, lessen the burdens of government and conduct scientific research in connection with establishing Austin, Texas as America's clean energy laboratory for developing clean, cost effective and efficient methods of energy production and delivery.
- (G) Pecan Street Project, Inc. will accomplish this goal by, among other things, conducting and facilitating research aimed at designing and testing a sustainable business model that relies on locally produced, user-managed, clean energy.
- (H) The formation of Pecan Street Project, Inc. is necessary and proper and is in the public interest and it will carry out a public purpose.
- (I) The City has been presented with and examined the Certificate of Formation of Pecan Street Project, Inc. and the Bylaws, and the City Council finds that the form and substance of such Certificate of Formation and Bylaws are satisfactory, and finds that it is in the best interest of the public and the City to authorize and approve the incorporation of Pecan Street Project, Inc.

PART 2. The City Council hereby authorizes and approves the incorporation of Pecan Street Project, Inc. ("Corporation"), and hereby approves the Certificate of Formation and Bylaws of the Corporation substantially in the forms presented to the City Council, attached as Exhibit A. The Corporation is being created for the specific purpose of promoting social welfare, lessening the burdens of government and conducting scientific research as well as development and diversification of the economy of the state which will result in the creation of jobs.

PART 3. The following persons are hereby appointed by the City Council to represent the City on the Board of Directors of the Corporation and to serve as initial Directors of the Corporation: Randi Shade, Councilmember and Roger Duncan, General Manager, Austin Energy.

PART 4. The city council waives the requirements of City Code Section 2-7-63 (*Prohibition on Conflicts of Interest*) to Pecan Street Project, Inc.

PART 5. The City Council directs the City Manager to provide a monthly report of any financial or monetary contribution made by the City to Pecan Street Project, Inc.

PART 6. The council finds that the need to obtain the financial benefit to the city of federal stimulus funds under the American Recovery and Reinvestment Act, including compliance with application deadlines, constitutes an emergency. Because of this emergency, this ordinance takes effect immediately on its passage for the immediate preservation of the public peace, health and safety.

PASSED AND APPROVED

_____ August 6 _____, 2009

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§ _____
Lee Leffingwell
Mayor

APPROVED: _____
David Allan Smith
City Attorney

ATTEST: _____
Shirley A. Gentry
City Clerk

**CERTIFICATE OF FORMATION
OF
PECAN STREET PROJECT, INC.**

A Texas Nonprofit Corporation

I, the undersigned natural person of the age of 18 years or more, citizen of the State of Texas, acting as the organizer of a nonprofit corporation under Chapter 22 of the Texas Business Organizations Code (the "TBOC"), do hereby adopt the following Certificate of Formation for the corporation:

ARTICLE I.

The filing entity being formed is a nonprofit corporation. The name of the corporation is Pecan Street Project, Inc. (the "Corporation").

ARTICLE II.

The street address of the initial registered office of the Corporation is 721 Barton Springs Rd., Austin, Texas 78704-1194, and the name of its initial registered agent at such address is Austin Energy, Attn: General Manager.

ARTICLE III.

The full and complete management and control of the Corporation shall be vested in the Board of Directors, the number of which shall be subject to change from time to time as provided in the Bylaws of the Corporation, but which number shall never be less than three individuals.

The initial Board of Directors shall consist of six members. The name and mailing address of each initial director who is to serve until his or her successor is elected and qualified are as follows:

Name	Address
Roger Duncan	c/o Austin Energy 721 Barton Springs Rd. Austin, Texas 78704-1194
Randi Shade	c/o Austin City Hall 301 W. 2nd St. 2nd Floor Austin, Texas 78701

Name	Address
Jose Beceiro	c/o The Greater Austin Chamber of Commerce 210 Barton Springs Road, Suite 400 Austin, Texas 78704
James D. Marston	c/o Environmental Defense Fund 44 East Avenue, Suite 304 Austin, Texas 78701
Thomas F. Edgar	c/o The University of Texas at Austin 1 University Station C0400 Austin, Texas 78712-0231
Isaac Barchas	c/o IC ² Institute The University of Texas at Austin 3925 West Braker Lane Austin, Texas 78759

ARTICLE IV.

The Corporation shall not have members.

ARTICLE V.

The purpose for which the Corporation is organized exclusively for charitable, scientific and educational purposes as allowed by Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), and applicable regulations thereunder. Subject to the foregoing, the Corporation will promote social welfare, lessen the burdens of Government and conduct scientific research in connection with establishing Austin, Texas as America's clean energy laboratory for developing clean, cost effective and efficient methods of energy production and delivery. The Corporation will accomplish this by, among other things, conducting and facilitating research aimed at designing and testing a sustainable business model that relies on locally produced, user-managed, clean energy.

ARTICLE VI.

The Corporation shall have all of the powers, duties, authorizations and responsibilities as provided for nonprofit corporations in the TBOC; *provided, however*, the Corporation shall neither have nor exercise any power, nor shall it engage directly or indirectly in any activity, that is inconsistent with activities of an organization described in Section 501(c)(3) of the Code, or as a corporation contributions to which are deductible under Section 170(a)(1) of the Code by virtue of being charitable contributions as defined in Section 170(c)(2) of the Code.

ARTICLE VII.

The Corporation shall have no power to take any action that would be inconsistent with the requirements for tax exemption under Section 501(c)(3) of the Code and related regulations, rulings, and procedures. The Corporation shall have no power to take any action prohibited by the TBOC. Regardless of any other provision in this Certificate of Formation or state law, the Corporation shall be subject to the following provisions:

(1) The Corporation shall not engage in activities or use its assets in manners that are not in furtherance of one or more exempt purposes, as set forth above and defined by the Code and related regulations, rulings, and procedures, except to an insubstantial degree.

(2) The Corporation shall not serve a private interest other than one that is clearly incidental to an overriding interest.

(3) The Corporation shall not devote more than an insubstantial part of its activities or resources to attempting to influence legislation by propaganda or otherwise, except as allowed by the Code and related regulations, rulings, and procedures.

(4) The Corporation shall not participate in or intervene in any political campaign on behalf of or in opposition to any candidate for public office. The prohibited activities include the publishing or distributing of statements and any other direct or indirect campaign activities.

(5) The Corporation shall not permit any part of the net earnings of the Corporation to inure to the benefit of any private entity or individual, except for reasonable compensation as set forth in Article XI below.

(6) The Corporation shall not carry on an unrelated trade or business, except as a secondary purpose related to the Corporation's primary, exempt purpose.

ARTICLE VIII.

The Corporation shall indemnify any person who was, is, or is threatened to be made a named defendant or respondent in litigation or other proceedings because the person is or was a director or officer of the Corporation or other person related to the Corporation in accordance with the provisions of the TBOC. As provided by the bylaws, the Board of Directors shall have the power to define the requirements and limitations for the corporation to indemnify directors, officers and other persons related to the Corporation.

ARTICLE IX.

To the fullest extent permitted by applicable law, no director of the Corporation shall be liable to the Corporation for monetary damages for an act or omission in the director's capacity

as a director of the Corporation, except that this Article shall not eliminate or limit the liability of a director of the Corporation to the extent the director is found liable for:

- (1) A breach of such director's duty of loyalty to the Corporation;
- (2) An act or omission not in good faith that constitutes a breach of duty of the director to the Corporation or an act or omission that involves intentional misconduct or a knowing violation of the law;
- (3) A transaction from which such director received an improper benefit, whether or not the benefit resulted from an action taken within the scope of such director's office; or
- (4) An act or omission for which the liability of such director is expressly provided for by statute.

Any repeal or amendment of this Article by the Corporation shall be prospective only, and shall not adversely affect any limitation on the personal liability of a director of the Corporation existing at the time of such repeal or amendment. In addition to the circumstances in which a director of the Corporation is not personally liable as set forth in the foregoing provisions, a director shall not be liable to the Corporation to such further extent as permitted by any law hereafter enacted, including without limitation, any subsequent amendments of the TBOC.

ARTICLE X.

This Certificate of Formation may be amended only by the affirmative vote of a majority of all of the members of the Board of Directors, except that Article V may be amended only by the affirmative vote of all the members of the Board of Directors and no amendment shall authorize the Board of Directors to conduct the affairs of the Corporation in any manner or for any purpose contrary to the provisions of Section 501(c)(3) of the Code, or any successor provision.

ARTICLE XI.

The Corporation is organized for non profit purposes. No part of the net earnings of the Corporation shall inure to the benefit of any director or officer of the Corporation, or any private individual, except that reasonable compensation may be paid for services rendered to or for the Corporation affecting one or more of its purposes (and no director or officer of the Corporation, or any private individual, shall be entitled to share in the distribution of any of the corporate assets as set out in Article XII hereof).

ARTICLE XII.

Upon the dissolution of the Corporation, the Board of Directors shall, after paying or making provision for payment of all of the liabilities of the Corporation, distribute such assets for

exempt purposes as contemplated under Section 501(c)(3) of the Code and related regulations, rulings, and procedures. Without limiting the generality of the foregoing, the Corporation may distribute such assets to federal, state or local government bodies for a public purpose, or to such other eligible organization or organizations (as hereinafter defined) as the Board of Directors shall determine exclusively in furtherance of exempt purposes under Section 501(c)(3) of the Code. Any such assets not so disposed shall be disposed of by the Probate Court of the county in which the principal office of the Corporation is then located, exclusively for such purposes, or to such eligible organization or organizations as said court shall determine. For purposes of this Article, "eligible organization" or "eligible organization or organizations" shall refer to an organization or organizations exempt from federal income taxation as an organization described in Section 501(c)(3) of the Code or as a corporation contributions to which are deductible under Section 170(a)(1) of the Code by virtue of being charitable contributions as defined in Section 170(c)(2) of the Code.

ARTICLE XIII.

Any action which may be taken or which is required by law or the Certificate of Formation or Bylaws of the Corporation to be taken at meeting of the Corporation's directors, or an action that may be taken at a meeting of the directors or a committee, may be taken without a meeting, without prior notice, and without a vote, if a consent or consents in writing, setting forth the action so taken, shall have been signed by the number of directors or committee members necessary to take that action at a meeting at which all of the directors or committee members were present and voted; the written consent bears the date of the signature of each director or committee member who signs the consent; and, if the written consent is signed by less than all of the directors or committee members, the written consent is delivered to the Corporation within 60 days after the date of the earliest dated signature by hand or by certified or registered mail, return receipt requested.

ARTICLE XIV.

The name and address of the organizer is:

Name	Address
Steven M. Tyndall	Baker Botts L.L.P. 1500 San Jacinto Center 98 San Jacinto Austin, Texas 78701-4039

ARTICLE XV.

This Certificate of Formation shall become effective upon filing with the Secretary of State of the State of Texas.

IN WITNESS WHEREOF, I have set my hand hereunto as of this ____ day of August, 2009, subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument.

Steven M. Tyndall

BYLAWS
OF
PECAN STREET PROJECT, INC.

Adopted and Effective as of August __, 2009

The following Bylaws, adopted by the Board of Directors of Pecan Street Project, Inc., a Texas nonprofit corporation (the "Corporation"), as of the date first written above, shall govern the business of the Corporation, except as the same may be afterwards amended and except as the same may conflict with the Corporation's Certificate of Formation (as may be amended and restated from time to time, the "Certificate of Formation") or any provisions of the Texas Business Organizations Code (the "TBOC").

ARTICLE I

DIRECTORS

Section 1. Election of Directors, Board Composition; Terms.

(a) The business and affairs of the Corporation shall be managed by a Board of Directors. The initial members of the Board shall consist of those persons specified in the Certificate of Formation. Such initial Board of Directors shall manage the business and affairs of the Corporation until their successors are duly elected and qualified. Subject to the provisions herein, all subsequent members of the Corporation's Board of Directors shall be elected by the affirmative vote of a majority of the directors then in office, and the number of directors on the Board may be increased or decreased from time to time by resolution of the Board or by due election of that number of directors by the Board. Each member of the Board agrees to vote, or cause to be voted, from time to time and at all times, in whatever manner as shall be necessary to ensure that at each annual or special meeting of the Board at which an election of directors is held, the following persons shall be elected to the Board:

(i) Two persons designated in writing by The City of Austin, which individuals shall initially be Randi Shade, representing Austin City Council, and Roger Duncan, representing Austin Energy; *provided, however*, that, if the person designated by The City of Austin representing Austin City Council shall no longer be a member of the Austin City Council, then such person shall be automatically removed with no further action required by the Board of Directors and such directorship shall remain vacant until filled in accordance with these Bylaws;

(ii) Two persons designated in writing by The University of Texas at Austin (the "University"), which individuals shall initially be Thomas F. Edgar, representing the University's academic departments, and Isaac Barchas, representing the University's IC² Institute;

(iii) One person designated in writing by Environmental Defense Fund, which individual shall initially be James D. Marston;

(iv) One person designated in writing by The Greater Austin Chamber of Commerce, which individual shall initially be Jose Beceiro;

(v) One or more person(s), if any, who is acceptable to each entity that has a right to designate a director pursuant to this section, whose background and qualifications shall represent such environmental advocacy and/or other public interests as such entities may from time to time see fit; and

(vi) Any other individual(s), if any, who is mutually acceptable to a majority of the directors then in office.

(vii) The Corporation's Executive Director, which individual shall serve as a non-voting, *ex officio* member of the Board and shall initially be vacant until such time as the position is filled by the Board; *provided, however*, that such *ex officio* member of the Board shall not be counted for purposes of determining quorum.

(b) Except as provided herein, directors shall serve a term of two (2) years. The directors of the Corporation shall be divided into three classes, and the terms of those directors elected pursuant to Sections 1(i)–(vi) of this Article I shall be staggered. Class 1 directors shall serve an initial term of one (1) year from the date hereof and shall be comprised of Thomas F. Edgar, Randi Shade and Jose Beceiro, or their successors in the event any such director ceases to serve on the Board prior to the date that is one (1) year from the date hereof. Class 2 directors shall serve an initial term of two (2) years from the date hereof and shall be comprised of Roger Duncan, Isaac Barchas and James D. Marston, or their successors in the event any such director ceases to serve on the Board prior to the date that is two (2) years from the date hereof. Any member of the Board elected pursuant to Sections 1(v)–(vi) of this Article I shall be designated as either a Class 1 or Class 2 director, and shall serve a term corresponding to the term of those other directors so designated, who are then in office. The Class 3 director shall be the Corporation's Executive Director who shall serve as director for so long as such person serves as the Corporation's Executive Director. Except as otherwise provided herein, if at the end of any director's term of office the entity that designated such director has failed to designate in writing such director's replacement, such incumbent director shall continue to serve in office for the new term and may then be removed only pursuant to the provisions of Section 4 of this Article I.

Section 2. Qualifications. Directors need not be residents of the State of Texas. Qualifications for serving as a member of the Board may be determined, from time to time, by amendment of these Bylaws.

Section 3. Resignation of Board Members. A director of the Corporation may resign at any time by providing written notice to the Corporation.

Section 4. Removal of Board Members. Except as provided herein, any director may be removed, with or without cause, by the Board. Notwithstanding the foregoing except as provided in Article I, Section 1(a)(i), no director elected pursuant to Sections 1(i)–(iv) of this Article I shall be removed from office, unless (i) such removal is approved in writing by the entity that designated such director, or (ii) the entity originally entitled to designate such director ceases, pursuant to amendment of these Bylaws or otherwise, to be entitled to designate such director. Upon the request of any entity entitled to designate a director as provided in Sections 1(i)–(iv) of this Article I to remove such director, such director shall be removed by the Board at the next meeting of the Board or, in the Board's sole discretion, at any earlier time by written consent.

Section 5. Vacancies. Any vacancy occurring in the Board of Directors that would not otherwise be filled by designation as set forth herein, or any directorship to be filled by reason of an increase in the number of directors may be filled by election at an annual or special meeting called for that purpose or by the affirmative vote of a majority of the remaining directors, though less than a quorum of the entire Board; *provided, however*, that any directorship filled by the Board by reason of an increase in the number of directors may only be filled for a term of office continuing until the next election of one or more directors of the Corporation.

Section 6. Regular Meetings. The Board of Directors shall meet at least once annually, either in or out of the State of Texas, for the transaction of such business as may properly be brought before it. No notice of annual meetings need be given to either existing or newly elected members of the Board of Directors. Regular meetings may be held at such other times and at such other places as shall be designated by the Board of Directors.

Section 7. Special Meetings. Special meetings of the Board of Directors may be called by or at the request of the Chairman of the Board, if there is one, the President (if such person is a director), the Executive Director or a majority of the members of the Board. The person or persons authorized to call special meetings of the Board of Directors may fix any place, either within or without the State of Texas, as the place for holding any special meeting of the Board of Directors called by them. Written, oral or any other mode of notice of the time and place shall be given for special meetings in sufficient time for the convenient assembly of directors thereat. Notice of the time, place and purpose of such meeting may be waived in writing before or after such meeting, and shall be equivalent to the giving of notice. Attendance of a director at such meeting shall also constitute a waiver of notice thereof, unless such director attends for the announced purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened. Except as otherwise provided herein, or in the Corporation's Certificate of Formation, neither the business to be transacted at, nor the purpose of, any special meeting of the Board of Directors need be specified in the notice or waiver of notice of such meeting.

Section 8. Quorum. A majority of the entire Board of Directors present in person or by proxy shall constitute a quorum for the transaction of business at any meeting of the Board of Directors, and the act of a majority of the directors present at any meeting at which a quorum is present shall be the act of the Board of Directors. If a quorum shall not be present at any meeting

of the Board of Directors, the directors present thereat may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum shall be present.

Section 9. Proxies. A director of the Corporation may vote by proxy executed in writing by the director. A proxy expires upon the earlier of (i) three months after the date the proxy is executed, (ii) revocation by such director as granted the proxy or (iii) the time provided by the terms of such proxy.

Section 10. Action by Written Consent. Any action required or permitted to be taken at any meeting of the Board of Directors may be taken without a meeting, without prior notice, and without a vote, if a consent or consents in writing, setting forth the action so taken, shall have been signed by the number of directors or committee members necessary to take that action at a meeting at which all of the directors or committee members were present and voted; the written consent bears the date of the signature of each director or committee member who signs the consent; and, if the written consent is signed by less than all of the directors or committee members, the written consent is delivered to the Corporation within 60 days after the date of the earliest dated signature by hand or by certified or registered mail, return receipt requested. Such consent shall have the same force and effect as a unanimous vote at a meeting of the Board of Directors, and may be stated as such in any document or instrument filed with the Secretary of State of the State of Texas.

Section 11. Meetings by Conference Telephone. Meetings of the Board of Directors may be held by means of a conference telephone, web conferencing or similar communications equipment by means of which all persons participating in the meeting can hear each other. Participation in a meeting pursuant to this Article I, Section 11 shall constitute presence in person at such meeting, except where a director participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

Section 12. Committees of the Board.

(a) The Board may, by resolution adopted by the majority of the directors in office, designate one or more committees to have and exercise the authority of the Board in the management of the Corporation to the extent provided by such resolution; *provided however*, that any such management committee shall consist of at least 2 persons, the majority of which are directors; *provided further*, that the designation of any such management committee shall not operate to relieve the Board, or any individual director, of any responsibility imposed on the Board or director by law, and any committee member who is not a director has the same responsibility with respect to the committee as a committee member who is a director.

(b) The Board may, by resolution adopted by the majority of the directors at a meeting at which a quorum is present, designate and appoint one or more committees to serve in an advisory capacity to the Board; *provided however* that (i) any such committee shall not have the authority to act on behalf of the Board of Directors in the management of the Corporation, and (ii) membership on any such committee shall not be limited to directors.

Section 13. Compensation. The directors shall receive no compensation for their services as directors of the Corporation. No director or entity entitled to designate any director shall be prevented from receiving reasonable compensation for other services rendered to the Corporation by reason of the fact that he or she is also a director, or such entity is entitled to designate any director, of the Corporation. All directors shall be reimbursed for their reasonable expenses of attendance at each regular or special meeting of the Board of Directors.

Section 14. Liability. No director of the Corporation shall be liable to the Corporation for monetary damages for an act or omission in the director's capacity as a director, except to the extent otherwise expressly provided by the Certificate of Formation.

ARTICLE II

OFFICERS

Section 1. General. The officers of the Corporation shall be elected by the affirmative vote of a majority of Board of Directors and shall include a President, Secretary and Treasurer. Additionally, the Board of Directors, in its discretion, may elect a Chairman of the Board, or such other officers and assistant officers as the Board of Directors deems appropriate or necessary.

Section 2. Term of Office. Officers shall maintain their office until such officer's successor shall have been duly elected and qualified, or until the death, resignation or removal in the manner hereinafter provided of such officer.

Section 3. Resignation, Removal and Vacancies. Any officer may resign at any time. Such resignation shall be made in writing and shall take effect at the time specified therein, or, if no time is specified, at the time of its receipt by the President or Secretary. The acceptance of a resignation shall not be necessary to make it effective, unless expressly so provided in the resignation. Any officer elected or appointed by the Board of Directors may be removed with or without cause by the affirmative vote of a majority of the Board of Directors, but such removal shall be without prejudice to the contract rights, if any, of the person so removed. Election or appointment of an officer shall not of itself create any contractual rights. Whenever any vacancies shall occur in any office by death, resignation, removal, increase in the number of officers of the Corporation, or otherwise, such vacancy shall be filled by election by the majority of directors on the Board of Directors, and the officer so elected shall hold such office until his or her successor is duly elected and qualified.

Section 4. Chairman of the Board. The Chairman of the Board, if there is one, shall preside at all meetings of the Board of Directors and approve the minutes of all proceedings of such meetings, and shall be available to consult with and advise the officers of the Company with respect to the conduct of the business and affairs of the Company and shall have such other powers and duties as designated in accordance with these Bylaws and as may, from time to time, be assigned by the Board of Directors. The Chairman of the Board need not otherwise be a director or officer of the Corporation.

Section 5. President. The President shall supervise and control all business and affairs of the Corporation. In the absence of the Chairman of the Board, or if there is none, the President shall (if the President is a director) preside at all meetings of the Board of Directors. The President may sign, with the Secretary or any other proper officer of the Corporation thereunto authorized by the Board of Directors, any deeds, mortgages, bonds, contracts or other instruments except in cases where the signing and execution thereof shall be expressly delegated by the Board of Directors to some other officer of the Corporation, or shall be required by law to be otherwise signed and executed, and in general shall perform all duties incident to the office of President and such other duties as may be prescribed by the Board of Directors from time to time.

Section 6. The Vice President. At the request of the President, or in the President's absence or disability, the Vice President shall, in the order of their election, perform the duties of the President, and, when so acting, shall have all the powers of, and be subject to all restrictions upon, the President. Any action taken by a Vice President in the performance of the duties of the President shall be conclusive evidence of the absence or inability to act of the President at the time such action was taken. The Vice President shall perform such other duties as may, from time to time, be assigned to them by the Board of Directors or the President.

Section 7. Secretary The Secretary shall attend all meetings of the Board of Directors and shall record the proceedings had at such meetings in a book suitable for that purpose. The person holding the office of Secretary shall also perform such other duties as may be assigned to the Secretary by the Board of Directors. The duties of the Secretary may also be performed by any Assistant Secretary, if there is one.

Section 8. Treasurer. The Treasurer shall keep complete and accurate records of account, showing at all times the financial condition of the Corporation. The Treasurer shall be the legal custodian of all money, notes, securities and other valuables which may from time to time come into the possession of the Corporation. He or she shall furnish at meetings of the Board of Directors, or whenever requested, a statement of the financial condition of the Corporation and shall perform such other duties as these Bylaws may require or the Board of Directors may prescribe. The duties of the Treasurer may be performed by an Assistant Treasurer, if there is one.

Section 9. Bonds of Officers. The Board of Directors may secure the fidelity of any officer of the Corporation by bond or otherwise, on such terms and with such surety or sureties, conditions, penalties or securities as shall be deemed proper by the Board of Directors.

Section 10. Delegation. The Board of Directors may delegate temporarily the powers and duties of any officer of the Corporation, in case of his or her absence or for any other reason, to any other officer, and may authorize the delegation by any officer of the Corporation of any of his or her powers and duties to any agent or employee, subject to the general supervision of such officer.

ARTICLE III

INDEMNIFICATION AND INSURANCE

Section 1. Right to Indemnification. Subject to the limitations and conditions as provided in this Article III, each person who was or is made a party or is threatened to be made a party to or is involved in any threatened, pending or completed action or other proceeding, whether civil, criminal, administrative, arbitrative or investigative, or any appeal in such a proceeding or any inquiry or investigation that could lead to such a proceeding (hereinafter a "Proceeding"), by reason of the fact that such person, or a person of whom he or she is the legal representative, is or was a director or officer of the Corporation or while a director or officer of the Corporation is or was serving at the request of the Corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, limited liability company, partnership, joint venture, sole proprietorship, trust, employee benefit plan or other enterprise shall be indemnified by the Corporation to the fullest extent permitted by the TBOC, as the same exists or may hereafter be amended against judgments, penalties (including excise and similar taxes and punitive damages), fines, settlements and reasonable expenses (including, without limitation, attorneys' fees) actually incurred by such person in connection with such Proceeding, and indemnification under this Article III shall continue as to a person who has ceased to serve in the capacity which initially entitled such person to indemnity hereunder. The rights granted pursuant to this Article III shall be deemed contract rights, and no amendment, modification or repeal of this Article III shall have the effect of limiting or denying any such rights with respect to actions taken or Proceedings arising prior to any such amendment, modification or repeal. It is expressly acknowledged that the indemnification provided in this Article III could involve indemnification for negligence or under theories of strict liability.

Section 2. Limitation on Indemnification. Subject to applicable law, notwithstanding any language in this Article III to the contrary, in no event shall any person be entitled to indemnification pursuant to this Article III if it is established or admitted:

(a) in a final judgment of a court of competent jurisdiction; or

(b) by such person in any affidavit, sworn statement, plea arrangement or other cooperation with any government or regulatory authority that:

(i) the person's acts or omissions that would otherwise be subject to indemnification under this Article III were committed in bad faith or were the result of active and deliberate dishonesty; or

(ii) such person personally gained a profit to which he or she was not legally entitled with an action or omission that would otherwise be subject to indemnification pursuant to this Article III.

Section 3. Advancement of Expenses. The right to indemnification conferred in this Article III shall include the right to be paid or reimbursed by the Corporation the reasonable expenses incurred by a person of the type entitled to be indemnified above who was, is or is threatened to be made a named defendant or respondent in a Proceeding in advance of the final

disposition of the Proceeding and without any determination as to the person's ultimate entitlement to indemnification; *provided, however*, that the payment of such expenses incurred by any such person in advance of the final disposition of a Proceeding shall be made only upon delivery to the Corporation of a written affirmation by such indemnified person of his or her good faith belief that he or she has met the standard of conduct necessary for indemnification under this Article III and a written undertaking, by or on behalf of such person, to repay all amounts so advanced if it shall ultimately be determined that such indemnified person is not entitled to be indemnified under this Article III or if such indemnification is prohibited by applicable law.

Section 4. Indemnification of Employees and Agents. The Corporation, by adoption of a resolution by the Board of Directors or a duly appointed committee of the Board of Directors, may indemnify and advance expenses to an employee or agent of the Corporation to the same extent and subject to the same conditions under which it may indemnify and advance expenses to directors and officers under this Article III; and, the Corporation, by adoption of a resolution by the Board of Directors or a duly appointed committee of the Board of Directors, may indemnify and advance expenses to persons who are not or were not directors, officers, employees or agents of the Corporation but who are or were serving at the request of the Corporation as a director, officer, manager, member, partner, venturer, proprietor, trustee, employee, agent or similar functionary of another foreign or domestic corporation, limited liability company, partnership, joint venture, sole proprietorship, trust, employee benefit plan or other enterprise against any liability asserted against him or her and incurred by him or her in such a capacity or arising out of his or her status as such a person to the same extent that it may indemnify and advance expenses to directors and officers under this Article III.

Section 5. Appearance as a Witness. Notwithstanding any other provision of this Article III, the Corporation may pay or reimburse expenses incurred by a director, officer, employee, agent or other person in connection with his or her appearance as a witness or other participation in a Proceeding at a time when he or she is not a named defendant or respondent in the Proceeding.

Section 6. Nonexclusivity of Rights. The right to indemnification and the advancement and payment of expenses conferred in this Article III shall not be exclusive of any other right which a director or officer or other person indemnified pursuant to this Article III may have or hereafter acquire under any law (common or statutory), provision of these Bylaws or the Certificate of Formation, agreement, vote of disinterested directors or otherwise.

Section 7. Insurance. The Corporation may purchase, procure, establish and maintain, at its expense, insurance or another arrangement to indemnify or hold harmless, to protect itself and any person who is or was serving as a director, officer, employee or agent of the Corporation or is or was serving at the request of the Corporation as a director, officer, manager, member, partner, venturer, proprietor, trustee, employee, agent or similar functionary of another foreign or domestic corporation, limited liability company, partnership, joint venture, proprietorship, employee benefit plan, trust or other enterprise against any expense, liability or loss, whether or not the Corporation would have the power to indemnify such person against

such expense, liability or loss under this Article III. the power to indemnify such person against such expense, liability or loss under this Article III.

Section 8. Savings Clause. If this Article III or any portion hereof shall be invalidated on any ground by any court of competent jurisdiction, then the Corporation shall nevertheless indemnify and hold harmless each director, officer or any other person indemnified pursuant to this Article III as to costs, charges and expenses (including attorneys' fees), judgments, fines and amounts paid in settlement with respect to any action, suit or Proceeding, whether civil, criminal, administrative or investigative to the full extent permitted by any applicable portion of this Article III that shall not have been invalidated and to the fullest extent permitted by applicable law. For purposes of this Article III, the term "Corporation" shall include any predecessor of the Corporation and any constituent corporation (including any constituent of a constituent) absorbed by the Corporation in a consolidation or merger; the term "other enterprise" shall include any corporation, limited liability company, partnership, joint venture, trust or employee benefit plan; service "at the request of the Corporation" shall include service as a director, officer, manager or employee of the Corporation which imposes duties on, or involves services by, such director, officer, manager or employee with respect to an employee benefit plan, its participants or beneficiaries; any excise taxes assessed on a person with respect to an employee benefit plan shall be deemed to be indemnifiable expenses; and action by a person with respect to an employee benefit plan which such person reasonably believes to be in the interest of the participants and beneficiaries of such plan shall be deemed to be action not opposed to the best interests of the Corporation.

ARTICLE IV

NOTICES

Section 1. Notices. Whenever written notice is required by law, the Certificate of Formation or these Bylaws to be given to any director, such notice may be given by mail, addressed to such director, at his or her address as it appears on the records of the Corporation, with postage thereon prepaid, and such notice shall be deemed to be given at the time when such notice shall be deposited in the United States mail. Written notice may also be given personally or by facsimile transmission, telegram, telex or cable, and notice shall be deemed given at the time such notice is transmitted.

Section 2. Waivers of Notice. Whenever any notice is required by law, the Certificate of Formation or these Bylaws to be given to any director, a waiver thereof in writing, signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of such notice.

ARTICLE V

GENERAL PROVISIONS

Section 1. Amendments. Except as provided by the Certificate of Formation of the Corporation, these Bylaws may be altered, amended or repealed, in whole or in part, by affirmative vote of a majority of the members of the Board of Directors of the Corporation.

Section 2. Fiscal Year. The fiscal year of the Corporation shall be fixed by resolution of the Board of Directors.